Supreme Court, U.S.
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No. 97-504

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

MARY FORSYTH, MARIETTA CADE,
WILLIE ANDREWS, MARY LOU BUEHLER,
HELEN STAVES, RANDOLPH BRATTON,
AND SEARLE AUTO GLASS, INC.,
Cross-Petitioners,

v.

HUMANA INC., and
HUMANA HEALTH INSURANCE OF NEVADA, INC.,
Cross-Respondents.

On Conditional Cross-Petition for Writ of Certiorari To the United States Court of Appeals for the Ninth Circuit

OPPOSITION TO CONDITIONAL CROSS-PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Cross-petitioners' statement of the questions presented does not accurately recite the issues presented by the Conditional Cross-Petition. The questions actually presented are:

1. Did the Ninth Circuit correctly apply this Court's decision in *Varity Corp. v. Howe*, ___ U.S. ___, 116 S. Ct. 1065 (1996), to the facts shown by the record before it?

2. Did the Ninth Circuit correctly conclude that, on the record before it, there was no genuine issue of material fact regarding the absence of a causal nexus between the predicate acts alleged by the Premium Payor Class in support of their RICO claim and the damages claimed by that same class?

RULE 29.6 STATEMENT

Humana Inc. ("Humana") and Humana Health Insurance of Nevada, Inc. ("Humana Insurance"), cross-respondents herein, were defendants in the district court and appellees in the court of appeals. Humana Insurance is a wholly owned subsidiary of Humana. There are no other parent corporations of petitioners and no nonwholly owned subsidiaries; but, by reason of certain contractual obligations undertaken in connection with the acquisition of Humana's former hospital operations subsequent to the events at issue herein, Columbia/HCA Healthcare Corporation is beneficially interested in the outcome of this litigation.[1]

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[1] In the Conditional Cross-Petition, cross-petitioners erroneously state that Humana and Columbia/HCA Healthcare Corporation have merged.

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OPPOSITION TO CONDITIONAL CROSS-PETITION FOR WRIT OF CERTIORARI

INTRODUCTION

Humana and Humana Insurance have petitioned this Court for writ of certiorari (Docket No. 97-303) to address a conflict among the circuit courts respecting the application of the McCarran-Ferguson Act to the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1951 *et seq.* ("RICO"). In their Conditional Cross-Petition for Writ of Certiorari ("Cross-Petition"), cross-petitioners ask this Court to examine two additional aspects of the decision below:

(1) the Ninth Circuit's determination that relief under section 1132(a)(3) is inappropriate for the claim brought below by cross-petitioners under the Employee Retirement Income Security Act, 29 U.S.C. § 1001 *et seq.* ("ERISA"), since recovery under section 1132(a)(1) affords full relief for the excessive co-payment charges at issue; and (2) the Ninth Circuit's affirmance of the decision by the district court that the Premium Payor Class cannot recover under RICO for the alleged failure of Humana Insurance to reduce premiums to reflect discounts being afforded to it by Humana's Sunrise Hospital because the supposed over-charging for premiums was not proximately caused by the predicate acts of mail and wire fraud alleged.

As will appear, the Ninth Circuit's decision was correct on both issues. No question worthy of this Court's review is presented.

ARGUMENT

I. The Disposition of the ERISA Claim Presents No Question Worthy of Review.

The ERISA claim below was predicated upon the fact that, in determining co-payor obligations under the healthcare policies at issue, Humana Insurance did not credit the co-payors with a share of the discounts it received from Sunrise Hospital. In a decision for which none of the litigants here seeks review, the district court concluded that the policies required pro rata application of the discounts to the co-payment obligations and awarded the Co-Payor Class the difference between what the co-payors actually paid and what they would have paid if the co-payments had been

correctly calculated as relief under section 1132(a)(1) of ERISA.

In the portion of its decision with which cross-petitioners do take issue, however, the district court declined to make an award for breach of fiduciary duty under section 1132(a)(3) because: (i) then-dispositive Ninth Circuit authority did not allow plan beneficiaries to bring claims for breach of fiduciary duty on their own behalf; and (ii) on the facts in the record before the district court, the compensation allowable under section 1132(a)(3) would be duplicative of that already awarded under section 1132(a)(1) in any event. *See* Appendix to Petition for Writ of Certiorari ("App.") at pp. 48a through 59a.

While the appeal in this matter was pending, this Court decided *Varity Corp. v. Howe*, ___ U.S. ___, 116 S. Ct. 1065 (1996). As the Ninth Circuit acknowledged in its decision, *Varity* approved a broader range of actions under section 1132(a)(3) than had the Ninth Circuit authority on which the district court had relied. The Ninth Circuit noted, however, that *Varity* still precluded relief under section 1132(a)(3) where adequate relief for the beneficiaries' injuries is available under other ERISA provisions. In that regard, the Ninth Circuit agreed with the district court that the relief awarded under section 1132(a)(1) duplicated any relief that the record before it would support under section 1132(a)(3) and, accordingly, held that relief under 1132(a)(3) would not be "appropriate" under *Varity*. *See* App. at pp. 9a through 11a.

In support of their Cross-Petition, cross-petitioners argue: (i) that the Ninth Circuit ignored *Varity* and other controlling precedent; (ii) that the disgorgement remedy they

seek is more "appropriate" then a remedy that compensates the beneficiaries because of its deterrent effect; and (iii) that the beneficiaries sustained injuries not compensated by an award under section 1132(a)(1). *See* Cross-Petition at pp. 9-22. None of these arguments merits review.

The first argument is facially absurd. The Ninth Circuit did not ignore *Varity*; it applied that decision to the facts before it. The second argument is itself predicated upon a mis-reading of *Varity*. Cross-petitioners' argument that the remedy that they seek is more "appropriate" than a remedy that merely compensates plan beneficiaries because of the deterrent effect of the remedy they propose runs directly contrary to the admonition in *Varity* that relief under section 1132(a)(3) is limited to "appropriate" equitable relief and that relief under section 1132(a)(3) is *not* appropriate where there is elsewhere "adequate relief for a beneficiary's injury . . ." 116 S. Ct. at 1079.

Cross-petitioners' third argument is predicated upon the speculation that the method of calculation of co-payment obligations used by Humana Insurance may have discouraged hospital use by beneficiaries and upon the assertion that the data base used to compute the amount of compensation due under section 1132(a)(1) was flawed. *See* Cross-Petition at p. 17. The Cross-Petition makes no attempt to support the latter argument, and there is no support for it in the record. For the former argument, cross-petitioners cite to general discussions regarding the elasticity of demand for medical services and not to any evidence in the record before the courts below supporting the proposition that *any* class member, much less the class as a whole, had foregone any beneficial medical procedure as a consequence of the manner

in which co-payment obligations had been calculated. There was no such evidence in the record; none had ever been offered by cross-petitioners.

In short, the decision of the Ninth Circuit correctly applied the law to the facts before it. Even if this were not the case, however, review would not be warranted. As noted in this Court's Rule 10:

> "A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law."

Just so here.

II. The Disposition of the Premium Payor RICO Claim Presents No Question Worthy of Review.

As their RICO claim, the Premium Payor Class asserted that Humana Insurance had promised, in mail and wire advertisements, that discounts received from Sunrise Hospital would be used in the calculation of premiums and, through their expert witness, produced a report quantifying the difference between the premiums charged and the premiums that would have been charged if Humana Insurance had reduced premiums to reflect hospital discounts in accordance with that expert's methodology.

In moving for summary judgment below, Humana Insurance noted that the advertisements cited by the Premium Payor Class contain *no* promise regarding the calculation of premiums, much less a promise to use the methodology adopted by cross-petitioners' expert. The district court agreed, noting that the advertisements in question were no

more than "puffery" on the subject of premiums. App. at p. 88a. The Ninth Circuit also agreed and affirmed on that basis. App. at pp.26a through 28a.

Cross-petitioners argue that this was error because a jury might have found the requisite promise in the advertisements at issue. This is nonsense. The district court and the Ninth Circuit were plainly correct in characterizing the challenged ads as being mere puffery on this point. Again, however, even if there were room for contrary argument on the issue, certiorari does not issue to address such questions.

CONCLUSION

For the foregoing reasons, the Cross-Petition should be denied.

October 22, 1997 Respectfully submitted

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